



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 16, 2004

Mr. A. Wade Norman  
Bracewell & Patterson, L.L.P.  
500 North Akard Street, Suite 4000  
Dallas, Texas 75201-3387

OR2004-0405

Dear Mr. Norman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 194439.

Texans Can!, which you represent, received a request for 12 categories of information relating to the requestor; administrators and employees of Texans Can!; grievances, sexual harassment complaints, and a class action lawsuit; the San Antonio campus of Texans Can!; and the governance structure and by-laws of Texans Can!<sup>1</sup> You inform us that some of the requested information has been released. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.<sup>2</sup> We also have considered the comments that we received from the requestor.<sup>3</sup>

---

<sup>1</sup>You inform us that Texans Can! is a non-profit organization that operates Texas charter schools in five Texas cities. We note that an open-enrollment charter school is part of the public school system of the State of Texas and that any requirement in chapter 552 of the Government Code that applies to a school district, the board of trustees of a school district, or public school students is applicable to an open-enrollment charter school, the governing body of a charter holder, the governing body of an open-enrollment charter school, or students attending an open-enrollment charter school. See Educ. Code §§ 12.105, 12.1051.

<sup>2</sup>This letter ruling assumes that the submitted "representative sampling" of responsive information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes you to withhold any information that is substantially different from the submitted information. See Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

<sup>3</sup>See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

We first note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, some of the submitted information relates to a completed investigation made of, for, or by Texans Can! That information must be released under section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Section 552.103 of the Government Code is a discretionary exception to disclosure that may be waived. As such, this exception is not other law that makes information confidential for purposes of section 552.022.<sup>4</sup> Thus, you may not withhold any of the submitted information that is subject to section 552.022 under section 552.103.

We note, however, that you must withhold some of this information under section 552.101 of the Government Code. Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses the common-law right to privacy. Information must be withheld from disclosure under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court applied the common-law right to privacy addressed in *Industrial Foundation* to an investigation of alleged sexual harassment. The investigation files at issue in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. See 840 S.W.2d at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public's interest in the matter. *Id.* The court further held, however, that "the public does not possess a legitimate interest in the

---

<sup>4</sup>See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to Gov't Code § 552.103 may be waived).

identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See also* Open Records Decision Nos. 393 (1983), 339 (1982). If no adequate summary of the investigation exists, then all of the information relating to the investigation ordinarily must be released, with the exception of information that would tend to identify the victims and witnesses. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. Common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

The completed investigation that is subject to section 552.022(a)(1) involves allegations of sexual harassment. Accordingly, *Morales v. Ellen* is applicable to the information that relates to the investigation. In this instance, the investigative information includes an adequate summary of the investigation, as well as statements of the person accused of sexual harassment. You must release that information, which we have marked, except for those portions of the information that identify the victims and witnesses of the alleged sexual harassment. You must withhold the information that identifies the victims and witnesses, along with the rest of the information that relates to the investigation, under section 552.101 of the Government Code in conjunction with common-law privacy and *Ellen*. We have marked the types of information that you must withhold under section 552.101.

Next, we address your claim under section 552.103 with regard to the information that is not subject to section 552.022. This exception provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You inform us that Texans Can! reasonably anticipated litigation on the date of its receipt of this request for information.<sup>5</sup> You also state that the rest of the submitted information relates to the issues in the anticipated litigation. Having considered your arguments and reviewed the supporting documentation that you have submitted, we find that you have demonstrated that litigation was reasonably anticipated on the date of the receipt of this request for information. We also find that the remaining information relates to the anticipated litigation. We therefore conclude that section 552.103 is applicable to the submitted information that is not subject to section 552.022.

We note, however, that the opposing party in the anticipated litigation has already seen or had access to some of the information that would otherwise be protected by section 552.103. The purpose of section 552.103 is to enable a governmental body to protect its position in

---

<sup>5</sup>You also inform us that the opposing party in the anticipated litigation has filed a charge of discrimination with the Equal Employment Opportunity Commission. You have submitted documentation of this filing as further documentation of your claim under section 552.103. We note, however, that the charge of discrimination was filed subsequent to the date of the receipt of this request for information. Because section 552.103 requires a demonstration that litigation was pending or reasonably anticipated when the request for information was received, the subsequent filing of the charge of discrimination is not relevant to the question of whether litigation was reasonably anticipated when Texans Can! received this request. *See* Gov't Code § 552.103.

litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party has already seen or had access to information relating to anticipated litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, you may not withhold information that the opposing party already has seen or to which he has already had access under section 552.103. Otherwise, the submitted information that is not subject to section 552.022 is excepted from disclosure at this time under section 552.103. We note that the applicability of section 552.103 to that information ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Lastly, we note that some of the information that is not protected by section 552.103 is confidential under section 552.101 in conjunction with the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g.<sup>6</sup> FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). FERPA is incorporated into chapter 552 of the Government Code by section 552.026, which provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026; *see also* Open Records Decision No. 634 at 6-8 (1995). "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A).

Section 552.114(a) of the Government Code excepts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995).

---

<sup>6</sup>Section 552.101 also encompasses information that other statutes make confidential.

Some of the information that is not protected by section 552.103 contains the names of students. You must not release that information, which we have marked, unless you have authority under FERPA to do so.

In summary: (1) you may withhold much of the submitted information at this time under section 552.103 of the Government Code; (2) some of the information that is not protected by section 552.103 must be withheld under section 552.101 in conjunction with FERPA and common-law privacy; and (3) the rest of the submitted information must be released.<sup>7</sup> As sections 552.101 and 552.103 are dispositive, we need not address section 552.107.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free,

---

<sup>7</sup>We note that other information that you may not withhold under section 552.103 would ordinarily be excepted from disclosure under section 552.101 in conjunction with common-law privacy. Under other circumstances, you might also be required to withhold some of this information under section 552.117. See Gov't Code §§ 552.024, .117. In this instance, however, this additional information relates to the requestor, who has a special right of access to it. See *id.* § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Should you receive another request from a person who would not have a right of access to the requestor's private information, you should resubmit this same information and request another decision.

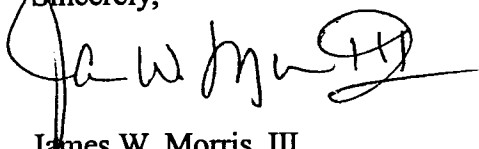
at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J W Morris III', with a stylized flourish at the end.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 194439

Enc: Submitted documents

c: Mr. Roger C. Guevara  
12023 Gable Oaks  
San Antonio, Texas 78253  
(w/o enclosures)